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No. 87-1150

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioners' Reply

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Petitioners' Reply

The District of Columbia has asked this Court to review a decision that ignores the careful conclusions the Court reached in *Johnson v. Transportation Agency, Santa Clara County,* 107 S. Ct. 1442 (1987). *Johnson* held that a public employer may engage in affirmative action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when two conditions are satisfied: when such action is addressed to the continuing effects of employment discrimination, and when it does not unduly infringe the interests of employees who are not its intended beneficiaries. *Id.* at 1452. The Court took pains to define the kind of evidence ("factual predicate") that would justify race-conscious action, stressing that the courts should not "create a significant

disincentive for employers to adopt an affirmative action plan." *Id.* at 1453. *Johnson* also held that the opponent of an affirmative action plan has the burden of proving that the plan is invalid. *Id.* at 1449.

The majority opinions below simply disregarded *Johnson's* teachings, reopening the issues this Court had finally resolved. In addition, in its zeal to disapprove race-conscious measures, the majority engaged in conduct wholly inappropriate for an appellate court, finding facts without support in the record and even contrary to the stipulation of the parties.

In its opposition to our petition (U.S. Br.), the federal government makes three general arguments in defense of the majority opinions below.

First, it argues that *Johnson* permits affirmative action only where there was extreme past discrimination which persists in present wholesale exclusion or segregation (U.S. Br. at 13). This argument cannot be squared with *Johnson.*

Second, the Department of Justice asserts that the District has not established a sufficient factual predicate for its action (*id.* at 7, 9, 13) and that there are apparent non-racial alternatives that the District failed to consider (*id.* at 14). This argument misstates the record, which shows that there was evidence that, in hiring firefighters, the District engaged in racially-discriminatory testing for at least a decade prior to 1980. It also ignores the fact that the burden of proving that this justification was pretextual had to be borne by the plan's opponent, the Department of Justice, which made no effort to shoulder it. In addition, the District did consider two of the three options the Department suggested, and the Department itself was challenging the third in other litigation as unlawful.

Third, the opposition claims that this case lacks importance because the District has voluntarily adopted new race-neutral measures which supersede the race-conscious measures at

issue in this case. *Id.* at 15. There is no basis for this contention. The District's actions in developing a subsequent plan have been coerced. The new plan is not in effect.

The *Hammon* respondents suggest that this case is moot. Br. at 24-25. That is certainly not so.

1. The Department of Justice urges that an employer cannot undertake race-conscious action under Title VII except in the most extreme instances of past and continuing discrimination. It perceives in *Johnson* a "requirement of prior, persisting exclusion or segregation as a necessary predicate to race-conscious employment action." U.S. Br. at 13. More starkly put, there must be a "position [that] continues to be reserved for white [male] employees, or . . . is so perceived." *Id.* at 10. This simply cannot be squared with *Johnson.*

Johnson specifically teaches that a manifest imbalance sufficient to constitute an adequate predicate for affirmative action "need not be such that it would support a prima facie case against the employer . . . ." *Id.* at 1452. Thus the lawfulness of affirmative action does not depend on the sort of extreme statistical evidence the Department asserts is indispensible. Indeed, an employer is not restricted to relying on statistical evidence of imbalance but can establish a proper predicate for race-conscious action by direct evidence of discrimination. Statistical evidence is simply a means to an end: ensuring that affirmative action is addressed to a situation caused by past discrimination.[1] Direct evidence of past discrimination is more probative (though not required even where the statistical evidence alone is not sufficient to establish a prima facie case). *Id.* at 1453. n.11.

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[1] "The requirement that a manifest imbalance relate to a traditionally segregated job category provides assurance both that sex or race will be taken into account in a *manner consistent with Title VII's purpose of eliminating the effects of employment discrimination,* and that the interests of those employees not benefitting from the plan will not be unduly infringed." *Id.* at 1452; emphasis supplied.

Here, there was abundant direct evidence of past discrimination: the use of a test that severely disadvantaged blacks and did not measure the principal requirements of the job, which are physical. There was also evidence of the consequences of that discrimination; namely, the difference between the black participation in the District government workforce generally, and black participation in the Fire Department, the part of the government using the apparently discriminatory test. To argue that *Johnson* does not permit race-conscious action in these circumstances—even race-conscious action which simply ensures that blacks are not again disadvantaged without a job-related reason—is to return to the uncertainty that prevailed before *Johnson*. That is why five judges of the court of appeals stated that leaving the decisions below unreviewed left the state of the law on this important issue wholly unsatisfactory.

2. The Justice Department attacks both the basis for the plan and its choice of means largely by misstating the facts.[2]

a. The race-conscious hiring plan at issue here was expressly based on the grounds that, for at least 1969-1980, the District had apparently discriminated against blacks in hiring firefighters by using Test 21, a test of cognitive and verbal skills which greatly disadvantaged blacks, to select for a job requiring essentially physical skills. Pet. at 7-8.

(i) The Department discounts the District's history of using Test 21 by simply stating that "with one minor ex-

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[2]The Justice Department also mischaracterizes our arguments. It asserts that we argued that "race-conscious action may be undertaken in the absence of any predicate of past discrimination." U.S. Br. at 13. In fact, we argued that "[t]he District here had an exceptionally strong basis for believing that it had discriminated against blacks in the past." Pet. at 15. Similarly, the Department argues against "[p]etitioner's assertion (Pet. 14) that nonminorities have no 'legitimate expectations' of being evaluated without regard to race. . . ." U.S. Br. at 14, n.8. What we argued was that whites had no legitimate expectation to be hired on the basis of higher test scores on the FST because higher test scores did not reflect better qualifications. Pet. at 14.

ception, the Fire Department never employed these tests as rank-ordering devices . . . ." U.S. Br. at 15, citing the decision below App. at 8a. In the petition, we showed that the cited statement of the court of appeals—that "rank ordering was not in fact employed . . . during the reign of Test 21" (App. at 8a)—was wholly unsupported appellate fact-finding, contrary to the findings in the plan. Pet. at 18. We also showed that this appellate fact-finding rested on a confusion of the concept of rank-order selection with that of exhausting the list from which selection was made.[3] The Department simply ignores this distinction and the record, as well its own 1979 study of Test 21, attached to our *en banc* filing below, which states that "applicants are ranked in the order of increasing test scores."[4] Repetition of a mistaken statement does not make the statement correct.[5]

(ii) The Department of Justice also ignores the fact that it had the burden of showing that the District's stated justification was pretextual. The burden on the employer is simply "to articulate a non-discriminatory rationale for

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[3]The court of appeals concluded that a change in the hiring process requiring exhaustion (selecting everyone on the list) meant that rank-ordering (selecting in order of test score) was no longer employed. The record shows that the change in the process was from a system in which "the examination was given continuously" so that "Whites who tended to score well were constantly being inserted on registers over Blacks who tended to cluster near the passing score" to one where "every register was exhausted before a new examination could be administered." Exhibit 11 to the Statement of Stipulated Material Facts at 10. Thus the change had to do with whether names were added to the registers, not with whether those on a register were selected in order of highest scores first.

[4]Payne, *Validity of Test 21 for Selection of Entry Level Firefighters* (Personnel Research Report 79-4, Office of Personnel Management, 1979) at 1.

[5]The Department also restates the court of appeals' reliance on the District's defense in the administrative proceedings preceding the *Hammon* suit against charges that it had discriminated against blacks in hire. U.S. Br. at 15. That reliance simply ignores the fact that the District was putting the complainants, who had sought money damages from it, to their proof. *See* Pet. at 18.

its decision." *Johnson, supra*, 107 S. Ct. at 1449. The District gave as its reason the underrepresentation of blacks caused by the decade-long use of Test 21 which, it stated, "tended to have an adverse impact on minorities both in the setting of the passing score and the ordering of the candidates . . . ." Plan at 23. When such a reason is stated, "the burden shifts to the plaintiff to prove that the employer's justification is pretextual." *Johnson, supra*, at 1449. The federal government did not assert, much less show, that candidates were not in fact selected in order of their scores on Test 21 (a test which the United States had developed and had administered throughout the relevant period). The court of appeals simply disregarded *Johnson* on the burden of proof.

b. The plan at issue here ensured that blacks were not disadvantaged by the use of the Firefighter Selection Test (FST) as they had been by Test 21, while the District was gathering additional information to see if the FST could be validated. As the federal government stipulated, the plan used race solely to offset the disadvantage which blacks would otherwise suffer from rank order selection on the FST. *See* Pet. at 21, n.30 (quoting Stipulation 30).

The Department of Justice challenges this choice of means because "the Fire Department did not even consider using nonracial means — such as recruitment through a cadet program, development of a valid test, or use of a physical agility requirement — to hire firefighters." U.S. Br. at 14.[6] The use of a cadet program was part of the very affirmative action plan at issue. Plan at 33-34. In addition, at the time the federal government brought this action, the record shows

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[6]The United States simply asserts that there must always be consideration of race-neutral alternatives as a precondition to lawful affirmative action under Title VII (U.S. Br. at 13-14) even though neither *Johnson* nor *Steelworkers v. Weber*, 443 U.S. 1983 (1979), involved such consideration or articulated such a requirement.

that the District *was* undertaking further validation efforts, namely, efforts to validate the FST, pursuant to the *Hammon* consent decree. *See* Pet. at 7.[7] Finally, when the Department was suggesting to the District that it employ a physical abilities test like that in Chicago, it had sued Buffalo alleging that just such a plan, modelled on Chicago's, discriminated unlawfully on the basis of sex.[8]

The Department does not explain why using race to offset adverse impact while attempting validation is not authorized under its own guidelines and the decisions of this Court. *See, e.g., United States v. Paradise,* 107 S. Ct. 1053, 1069 (1987). *See* Pet. at 20.

3. The Department's opposition is prominently based upon the assertion that the affirmative action plan at issue is "now-superseded." U.S. Br. at (i). By this it means that the plan has been displaced "by a racially neutral hiring plan that petitioners themselves have proposed and that the United States has accepted." *Id.* at 15. This misstates the facts. Furthermore, it is seriously misleading: the only way that the race-conscious hiring at issue here has been "superseded" is by the court of appeals' rulings below.

a. While the District developed an affirmative action plan for its Fire Department subsequent to the plan at issue below, it did so under the mandate of the court of appeals and pursuant to orders of the district court issued over the District's objection. The court of appeals issued its mandate on April 13, 1987, prior to the date on which the plan

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[7] Furthermore, to the extent the Department now suggests that tests from elsewhere should have been considered (*See* U.S. Br. at 8), it should be noted that it did not so suggest in the trial court. *See* App. at 146a (federal government suggested only a physical agility test).

[8] *See* Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupation as Gender-Based Employment Discrimination* 19 U.C. Davis L. Rev. 761, 791 (1986).

at issue was due to expire (Pet. at 10).[9] A week later, the district court ordered the District to submit to it a draft "of a legally sufficient Affirmative Action Plan regarding all aspects for . . . hiring . . . Firefighters . . .."[10] The District, which had timely sought rehearing of the panel decision below, objected to this order on the grounds, among others, that it should not have to submit a hiring plan while continuing to litigate on appeal the law that would govern.[11] The district court denied the motion.[12] The District then prepared another plan. The opening sentence in that plan makes it plain that it was adopted as a result of judicial compulsion: "This plan has been developed . . . in response to the April 21 and May 26, 1987 orders of the District Court . . . ." To characterize this as a plan "petitioners have themselves proposed," U.S. Br. at 15, is grossly misleading.[13]

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[9]The affirmative action plan at issue was intended to be effective from October 1984 through October 1986. Due largely to litigation, its hiring provisions did not go into effect until after the district court's April 26, 1985, stay order. To permit the plan to remain in effect for its two-year "design life," the District extended the hiring provisions until April 15, 1987. *See* the District's October 21, 1986 filing in the court of appeals. (As reflected in the December 10, 1986, docket entry set forth in the appendix to the *Hammon* respondents' brief, at H-3, the district court indicated that its permission was unnecessary while the case was on appeal). The court of appeals issued its mandate on April 13, 1987 (which forced the District to withdraw offers of employment it had made to two applicants. *See* the District's April 1, 1987 filing in the Circuit, Attachment 3 (Declaration of Glenard L. Buchanan) at 2). Because the court of appeals enjoined its operation before it had been effective two full years, the plan has never expired.

[10]April 21, 1987, order in *Hammon v. Barry*, Civ. Action Nos. 84-0903, 85-0782, 85-0797 (hereinafter referred to as *Hammon*).

[11]*See* District's May 8, 1987, motion in *Hammon* to vacate the April 21 order at 2, 7.

[12]Order in *Hammon* filed May 26 and entered in the docket May 27, 1987.

[13]The Department also wrongly asserts that it "has accepted" the 1987 "hiring plan." U.S. Br. at 15. The Department argued that the 1987 plan "as submitted should not be approved." *See* Response the United States to Affirmative Action Plan for Hiring and Promotions, in *Hammon* filed

(Footnote Continued)

b. The district court below has made it unmistakably clear that no affirmative action plan governed by these cases can be put into effect without its prior approval, App. at 131a, and it has never approved the June 26, 1987 plan.[14] Thus, the 1987 plan is not in effect and has not "superseded" anything.

Since the 1987 plan is not in effect, and since it was required to be developed under the rulings we seek to have reviewed, it hardly shows that review of these rulings is unimportant, as the Department contends. U.S. Br. at 16.

4. The foregoing makes it plain that this case is not moot, as the *Hammon* respondents contend. Br. at 24-25.[15] However, the District is trying to find some lawful means of hiring from the 1984 list.[16] Even if the District finds a

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[13] September 23, 1987, at 14. Furthermore, the Department requested modification to both of the only two specified elements of the hiring portion of the 1987 plan: race-conscious advertising for any test that will be developed and interim hiring from the cadet program. *See id.* at 4 (stating that race-conscious recruiting is unnecessary and requesting that recruitment procedures be set forth); 6 (requesting that period of sole reliance on the cadet program be specifically limited).

[14] Indeed, by order dated December 9, 1987, the district court in *Hammon* stayed consideration of the 1987 plan.

[15] The *Hammon* respondents argue that this case is moot in part because Department of Justice did not intervene in their action. *Id.* at 18-23. The district court, however, recognized the federal government's independent action by separately ruling on its motion for summary judgment. App. at 158a. The Department appealed from the district court's order "that defendants may implement the hiring provisions of the proposed Affirmative Action Plan . . . ." *Id.* at 163a.

[16] After a bidding and negotiation process that consumed eight months, the District entered into a contract on April 15, 1988 to develop a new entry-level examination. The contract requires completion within one year. However, unanticipated delays are apparently common. *See United States v. Paradise*, 107 S. Ct. 1053 (1987).

In the interim, the District has no valid test, and it is still prohibited from selecting firefighters by chance. *See* An Act Making Further Continuing Appropriations For the Fiscal Year Ending September 30, 1988, Pub. L. 100-262, § 101(c), 101 Stat. 1329-90 (Dec. 22, 1987). It may be, however, that the number of eligible applicants who are still available does not exceed the number of current vacancies. If that should prove to be the case, the District could avoid its present quandary of not being able lawfully to select from among applicants by hiring at one time all those who are left.

lawful, nondiscriminatory way to exhaust the 1984 list, however, this case would not be moot. Based on the rulings below, the Department of Justice has pledged to seek backpay and seniority relief for whites adversely affected by the District's race-conscious hiring.[17] The rulings below will also have collateral consequences on those parts of this action still pending in the district court,[18] and perhaps on other actions against the District.[19]

There is also no question that, unless reviewed, the rulings below will continue to create considerable confusion as to when an employer (public or private) may lawfully engage in affirmative action. If, despite its history of apparent testing discrimination, the District may not use race to offset adverse impact against blacks pending validation efforts, it is hard to discern when race-conscious action is lawful.

CONCLUSION

For the reasons stated above, and in our petition, the petition for certiorari should be granted.

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[17] Memorandum of the United States Concerning the 'Mootness' of this Case, filed in the court of appeals on April 7, 1987, at 10.

[18] Thus, for example, the United States has asserted in the district court that the court of appeals' decision proscribes promotion goals except to the extent that there is a "manifest imbalance" as determined by reference to the greater Washington labor market. *See* Response of the United States to Affirmative Action Plan For Hiring and Promotions filed in *Hammon* on September 23, 1987 at 8-10.

[19] The United States has continued to argue that, for the District to utilize the long-term goals required by D.C. Code § 1-507 (1982), violates both Title VII and the Constitution. *Id.* at 11. Cf. also U.S. Br. at 8 ("The court concluded that 'the statutory goal of a racially-balanced workforce . . . stands condemned by Title VII and the higher law of the Constitution' ").

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